84-1791

Office - Supreme Court, U.S.
FILED
MAY 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. *et al.*,

Appellants,

v.

STATE OF TEXAS,

Appellee.

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

William Bentley Ball*
Philip J. Murren
Sandra E. Wise
BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Ann E. Coover
COOVER & COOVER
921 North Chaparral
Corpus Christi, TX 78401
(512) 882-2100

* *Counsel of Record*

Attorneys for Appellants

PACKARD PRESS / LEGAL DIVISION, 10TH AND SPRING GARDEN STS., PHILA., PA 19123 (215) 236-2000

25 pp

QUESTIONS PRESENTED

As an inherent part of its Scriptural duty to teach the Gospel message and to engage in works of mercy, a church has established homes for distressed adolescent children suffering from severe behavioral disorders. While the Church accepts fire, building occupancy, health, sanitation and safety regulations, it has declined, on the basis of sincerely held religious convictions, to obtain a license for its program of care from the Texas Department of Human Resources as a condition precedent to operating its homes. The homes, employing a distinctive methodology emphasizing spiritual regeneration, were held by the Texas Supreme Court to have "a good record of high quality service", "excellent physical facilities, a dedicated staff, and a list of many children who have been successfully treated by its program".

1. Does forbidding the Church to operate its homes, solely on account of the Church's refusal to obtain a state license for them and to conform them to a state-prescribed methodology and program of care, violate rights of the Church protected by the Free Exercise Clause of the First Amendment?

2. Does application to the Church's homes of the Texas Human Resources Code's licensing and regulatory scheme create excessive entanglements between government and a Church ministry, forbidden by the Establishment Clause of the First Amendment?

3. Does forbidding the Church to operate its homes, unless it will accept State licensing and the State's methodology of treatment, deprive child residents of the homes of due process of law, contrary to the Due Process Clause of the Fourteenth Amendment, by arbitrarily depriving them of vitally needed protection and nurture?

4. Does forbidding the Church to operate its homes, unless it will accept State licensing and the State's methodology of treatment, violate rights of parents, protected by the First and Ninth Amendments, to select a religious

form of care for their children which they deem best suited to help them?

5. Does forbidding the Church to operate its homes, unless it will accept State licensing and the State's methodology of treatment, violate rights of the Church's pastor and staff members, protected by the Free Exercise Clause of the First Amendment, to pursue a religious vocation in the nurture of children?

6. Did the Supreme Court of Texas violate rights of appellants, protected by the Due Process Clause of the Fourteenth Amendment, by arbitrarily setting aside the record facts?

PARTIES

The parties in the court below were:

PLAINTIFF (Appellee here)

The State of Texas

DEFENDANTS (Appellants here)

The Corpus Christi People's Baptist Church, Inc.*
The People's Church
Wiley Cameron
Fay Cameron
Robert Galloway
Frances Galloway
Lester Roloff (deceased)

INTERVENOR DEFENDANTS (Appellants here)

Alexander Forhetz
Janet Forhetz
Michael Gross
Norma Gross
Shari Compton
Stanley Williams
Diane Forhetz
Gaye Gross

---

* In accordance with Rule 28.1, The Corpus Christi People's Baptist Church, Inc. states that it is a corporation which has no parent companies or subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	10
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Arkansas Day Care Association, Inc. v. Clinton, 577 F. Supp. 388 (E.D. Ark. 1983) 13

Federal Election Commission v. National Conservative Political Action Committee, ____ U.S. ____, 53 U.S.L.W. 4293 (U.S. March 19, 1985) 11, 14

Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230 (4th Cir. 1984) 13

Kansas ex rel. O'Sullivan v. Heart Ministries, Inc., 608 P.2d 1102 (Kan. 1980), *appeal dismissed*, 449 U.S. 802 (1980) 10

Larkin v. Grendel's Den, Inc., 459 U.S. 297 (1983) 10

Lemon v. Kurtzman, 403 U.S. 602 (1971) 9, 13

Lynch v. Donnelly ____U.S. ____, 104 S.Ct. 1355 (1984) 10

Mueller v. Allen, 463 U.S. 388 (1983) 9

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 13

Parham v. J.R., 442 U.S. 584 (1979) 17

Prince v. Massachusetts, 321 U.S. 158 (1944) ... 9, 14

Roloff Evangelistic Enterprises, Inc. v. State, 556 S.W.2d 856, *appeal dismissed*, 439 U.S. 803 (1978) 8

Santosky v. Kramer, 455 U.S. 745 (1982) 15

Thomas v. Review Board, 450 U.S. 707 (1981) 13

Walz v. Tax Commission, 397 U.S. 664 (1970) .. 9, 13

Wisconsin v. Yoder, 406 U.S. 205 (1972) ... 11, 12, 14

TABLE OF AUTHORITIES—*(Continued)*

Page

CONSTITUTIONS:

Texas Constitution, Article 5, §6 14

United States Constitution:

Amendment I ..... *passim*

Amendment IX ..... *passim*

Amendment XIV, Section I ..... *passim*

STATUTES AND REGULATIONS:

TEX. ADMIN. CODE tit. 40 §83.601, *et seq.* 2, 5

TEX. HUM. RES. CODE ANN.:

§42.001, *et seq.* 2, 3

§42.001 3

§42.042(j) 6, 12

§42.042(k) 3

§43.001, *et seq.* 2

§43.004(4)(A) 6

28 U.S.C. §1257(2) 2

42 U.S.C. §1983 ..... 4, 7

42 U.S.C. §1985 4

No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. *et al.*,

Appellants,

v.

STATE OF TEXAS,

Appellee.

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment of the District Court for the 200th Judicial District of Travis County, Texas, was filed on May 27, 1981. The opinion of that court is unreported and appears as Appendix C hereto. The opinion of the Texas Court of Appeals, filed on April 26, 1984, is unreported and appears as Appendix B hereto. The opinion and order of the Supreme Court of Texas were filed on December 19, 1984 and appear as Appendix A hereto. That opinion is reported at 683 S.W.2d 692 (Tex. 1984).

JURISDICTION

The judgment of the Supreme Court of Texas, remanding the cause to the trial court with instructions to enjoin Corpus Christi People's Baptist Church from operating its child care facilities without a license, was entered on December 19, 1984. On February 13, 1985, the Supreme Court of Texas denied appellants' motion for rehearing. The notice of appeal was filed with the Supreme Court of Texas on April 30, 1985. The jurisdiction of this Court is invoked under Title 28 of the United States Code §1257(2).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

U.S. Constitution, Amendment IX:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

U.S. Constitution, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

TEX. HUM. RES. CODE ANN. §42.001, *et seq.* and §43.001, *et seq.* (See Appendix H).

TEX. ADMIN. CODE tit. 40 §83.601, *et seq.* ("Minimum Standards For Institutions Providing Basic Child Care"). (See Appendix I).

STATEMENT OF THE CASE

Corpus Christi People's Baptist Church operates three residential homes for distressed adolescent children suffering from severe behavioral disorders. (A-16).* The Church declines any local, State or federal funding for its homes, even by way of purchase of service, since it maintains them in fulfillment of a religious duty to teach the Gospel and to engage in works of mercy. (A-12). The homes address the emotional, social, physical and intellectual needs of the children in the setting of a long-term, protective "therapeutic community", whose methodology is essentially spiritual. The children are exposed to a religious way of life, in a disciplined and tranquil environment. (A-17 – A-19). They are placed there by their parents (A-12) and by courts. (Transcript, 121, 155). In the homes' educational program, the children average 1.7 grades above grade level on nationally standardized achievement tests. (A-18). 90% of the children who remain at the homes from three to twelve months have been helped dramatically. (A-19). Graduates of the homes are able to lead useful, productive lives. (*Ibid.*).

In 1979 the State of Texas demanded that the Church homes be licensed and regulated pursuant to §42.001, *et seq.* of the Texas Human Resources Code.[1]

* The signal "A" refers to the appendices hereto.

1. The Code provides no exemption from licensing of religious institutions. §42.001 recites that nothing in the Code shall give a governmental agency power to regulate, or be involved in, "the form, manner or content of religious instruction or the curriculum of a school sponsored by a religious organization." This purpose clause, however, is not an operative part of the statute and is limited to schools, and to "religious instruction" and "curriculum" therein. Similarly, §42.042(k) bars the Department's regulating of "the content or method" of "instruction" or "curriculum" of a religious school. The regulations of the Texas Department of Human Resources hold the homes' religious program of treatment to be fully subject to the regulatory scheme, notwithstanding the statutory provisions respecting "instruction" and "curriculum" in "schools". (A-60 – A-66).

Upon the Church's refusal, the State, on October 11, 1979, brought suit in the 200th Judicial District Court of Travis County, Texas, to enjoin the Church from operating its homes, unless and until it should be issued a license to do so, and to assess civil penalties against the Church of $50 to $1,000 per day (later reduced to $50 to $100 per day) for operating its facilities without a license. (A-46). The defendants, by answer filed November 11, 1979, raised the affirmative defenses that the licensing provisions of the Human Resources Code, as applied to them, were violative of the First, Ninth and Fourteenth Amendments to the Constitution of the United States, and of 42 U.S.C. §§1983 and 1985. (A-46 – A-47).

Four parents of children enrolled in the homes (Alexander Forhetz, Janet Forhetz, Michael Gross and Norma Gross) sought intervention as parties defendant, on the ground of their right and duty to select that form of care for their children which they deem best suited to protect and aid them. Two children, residents of the homes, Diane Forhetz and Gaye Gross, sought intervention on the ground of their desire to remain in the homes and to continue to enjoy the homes' protection and aid. Two staff members, Shari Compton and Stanley Williams, sought intervention on the ground of their desire as Christians to pursue their vocations for the "moral, psychological and physical nurture and regeneration of children who are in severe emotional, psychological and physical distress." The intervenors, in their Plea For Intervention, filed on August 18, 1980, claimed that the Code, as applied to them, violated rights of theirs protected by the First, Ninth and Fourteenth Amendments. Their interventions were granted. (A-48). The trial court judge, on October 31, 1980, personally inspected and viewed the premises of the homes following his granting of defendants' motion that he do so.

Trial on the merits ensued in November, 1980, during which the Church, in briefs and through testimony, explicated its objections, under the Religion Clauses of

the First Amendment, to the application of the Code to its homes: (a) that the regulatory scheme amounts to the displacement of a pervasively religious mode of treatment, meticulously prescribed by the Church, with a secular mode of treatment, meticulously prescribed by the State; (b) that the Church is religiously barred from seeking or receiving a license, or permit, from government to engage in a ministry; (c) that the Department's regulatory scheme, embracing not only the more than 240 separate provisions of the "Minimum Standards" (Tex. Admin. Code tit. 40 §83.601, *et seq.*), but in addition "all requirements" which may be otherwise imposed in the discretion of the Department (A-19), thrusts the State pervasively into the operations of that ministry (A-19–A-28)[2]; (d) that there exists no compelling societal interest demanding State licensing and control of the homes (A-28–A-29); and (e) that the homes, in compliance with fire, health, building occupancy, sanitation and safety laws, are in themselves a successful means for fulfilling society's interest in the protection and regeneration of children (A-15–A-19, A-29).

The Church presented the testimony of child residents of the homes, parents of children enrolled there, alumni of the homes, officials of the Church and administrators of the homes. It also presented two expert witnesses in the field of child care — Dr. Robert Mendelsohn, a Chicago-based pediatric physician who had served as Senior Pediatric Consultant to the State of

2. More specifically, the Church objected to features of the Code and its multiple standards as not only subjecting its homes wholly to secular control, but determining features of the life of the homes which the Church deems essential features of its ministry: qualifications of staff, the plan of care, relationships between child and staff and between the homes and parents. It further objected to regulations requiring children to participate in community functions and recreational activities; imposing regulations discordant with Church requirements relating to dress, to evaluation of communications between children and parents, to modes of discipline, to confidentiality of church records, etc. (A-24–A-27).

Illinois Department of Mental Health and was national director of medical consultation services of Project Head Start; and Dr. Marie Gatza, Director of Training, Catholic Social Services of the Roman Catholic Archdiocese of Philadelphia. The trial court found the testimony of these experts to establish: (a) that there exists no professional consensus as to goals and methods to be used for the treatment of children with behavioral disorders; (b) that a spiritual methodology, such as the homes employ, which inculcates "belief in God -- a belief in one's dependence on God, one's living God's commandments and being sorry when one doesn't" can be very important to the mental health of children; and (c) that the "social work methodology" of secular state agencies does not and cannot speak to the spiritual dimension as a basic factor in the regenerating of children. (A-28–A-29).[3] The historic roots of Christian practice in saving and nurturing lost children, and the Scriptural objections to licensing of ministries, were detailed by an expert witness, the theologian Dr. Rousas J. Rushdoony. (A-14, A-25).

The Church also called as hostile witnesses principal officials of the Department of Human Resources in an effort to elucidate the meaning of statutory provisions and regulations — *e.g.*, Code §43.004(4)(A) dealing with the qualifications of a "child care administrator" and whether such interchangeably used terms as "plan of care", "plan of operation", "operational program", "min-

3. Neither the statute nor the Minimum Standards allow for religious variation from the plan of care prescribed by the Department. (See Findings of Fact Nos. 69, 70, 71, 73, 74, 75, 77, 81, 82 and 87, at A-19–A-23). The Code's provision for waiver, or variance, §42.042(j), does not allow exemption from licensing and, because it permits variances only for reasons of "economic impact", does not admit of any distinction based upon religion. See Defendants' Exhibit No. 25, which is the Department's denial of a request for a variance by Mother Teresa Santoyo, Superior General, Society of Christian Social Service, Corpus Christi, in order to protect the confidentiality of her religious ministry in relation to children's records. (Transcript, 211-213).

imum standards" and "all requirements" had the same or different meanings. (Transcript, pp. 196-207). The State, presenting no testimony to support its claim that application of the Code to the homes was necessitated by a compelling state interest or that it was the least restrictive means available, called as its witnesses one employee of the Department and two administrators of state-aided religiously affiliated institutions. The latter two testified, *inter alia,* that they believed it not necessary that a home for children be licensed in order to provide good child care. (A-29).

The district court, on May 27, 1981, having made findings of fact and conclusions of law, entered judgment in favor of defendants. (A-76–A-77). The court declared that the state licensing requirement was unconstitutional in its particular application to the Church's homes. Specifically, the court held that application of the Code's licensing requirement to the Church in the exercise of its ministry for the regeneration of distressed children constituted a prior restraint and violation of the Free Exercise rights of the pastor, the Church, the parents and staff members; that such application violated the Fourteenth Amendment's Due Process Clause by denying the children the right to enjoy the means of regeneration offered by the Church's homes; that the licensing-regulatory scheme created excessive entanglements between church and state forbidden by the Establishment Clause; and that such application violated 42 U.S.C. §1983, as well as the Ninth Amendment. (A-72–A-74).

The State appealed to the Texas Court of Appeals which, on April 26, 1984, affirmed, one judge dissenting, (A-11–A-44). The court noted that

> "[t]he trial court's Findings of Fact are not challenged on appeal. Therefore, they are binding on the parties and us and they become the facts of

> the case. Crain v. Hill Co., 613 S.W.2d 367, CCA (Waco) NRE 1981. They support the judgment."

(A-31).

The State appealed to the Supreme Court of Texas, which, on December 19, 1984, within one week following oral argument, reversed. That court stated, in part:

> "The issue is not whether People's Baptist is performing a service that falls beneath licensing standards. The three homes have a good record of high quality service."

(A-1–A-2). Again,

> "The record reveals that People's Baptist has provided excellent physical facilities, a dedicated staff and a list of many children who have been successfully treated by its programs."

(A-6). The court rejected the holdings of the two courts below with respect both to the Establishment Clause and the Free Exercise Clause.[4] It stated that the Church's reliance on the Establishment Clause was "misplaced", holding that the teaching of the Supreme Court of the United States on "excessive entanglements" addressed solely situations in which religious institutions are governmentally aided and not in which they are governmentally regulated:

> "The Establishment Clause cases address the issue of whether some form of government *aid*,

---

4. The court pointed to the case of *Roloff Evangelistic Enterprises, Inc. v. State*, 556 S.W.2d 856, *appeal dismissed*, 439 U.S. 803 (1978), as a case in which a "predecessor" of the Church had contended that the licensing act "impinged on the corporation's free exercise of religion". (A-2). The Texas Supreme Court did not, however, find that case controlling. The trial court judge in the present case, who had also been the equity chancellor in the *Roloff Evangelistic Enterprises* case, held the former (in which no trial record was made) to be an "entirely different case" involving different parties and different issues. (A-48).

> either direct or indirect, to a religious institution violates the Establishment Clause" [citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970)]."

(A-3). (Emphasis by the court). The court held that if it exempted religious institutions from the licensing requirements but not non-religious institutions, it would, "arguably", be violating "the second-prong of the Establishment Clause test because the primary effect would be to advance religion", *i.e.*, the State would be treating two classes of institutions unequally. (A-4). The court refused to treat the "excessive entanglement" issue separately from its Free Exercise analysis, instead identifying the "least restrictive means" test under the Free Exercise Clause with the "excessive entanglement" prohibition of the Establishment Clause. (A-4 – A-5).

Rejecting the Free Exercise claims of the Church and the other appellants (and by implication Findings of Fact by the trial court and the Court of Appeals Nos. 99 through 126 (A-24–A-28)), the Texas Supreme Court said that the facts that the homes are "excellent facilities", have a "dedicated staff", and have "successfully treated many children", "show how readily the homes can be approved for licensing." (A-6). The court ignored the trial court's conclusion that the State had failed to prove a compelling interest and held "that, as a matter of law, the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm." (*Ibid.*). The court further stated "[t]he State has a right and a duty to protect and nurture its minor children. *Prince v. Massachusetts*, 321 U.S. 158 (1944) . . ." The court held that since a state interest in the welfare and nurture of children was delineated in the purpose clause of the Human Resources Code, therefore, application of the Code to the Church's homes was justified by that interest. (*Ibid.*).

Finally, the court held that, since "no entity other than the State" can carry out the responsibility to protect children, the Code's licensing-regulatory scheme is the least restrictive of the alternatives which the State has. (A-7).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case is one of first impression in this Court. It involves nationally significant constitutional issues and presents them here in light of a fully developed factual record. The opinion of the Texas Supreme Court conflicts with basic teachings of the Supreme Court of the United States. Its judgment, if allowed to stand, will destroy an ongoing and beneficent resource, and promise chaos in the lives of the children and families involved. This appeal tests the ultimate question of whether the state shall have total governance of religious institutions for the care of children.

1. None of the first five Questions Presented has received plenary review by this Court.[5] The First Amendment issues which they frame, relating to liberties of churches and rights of parents to choose a religious program of treatment of children, go to the core of First Amendment concerns. Those issues are certainly not less significant than questions arising under the Religion Clauses which the Court has recently addressed pertaining to a municipal creche display (*Lynch v. Donnelly*, ____U.S. ____, 104 S.Ct. 1355 (1984)), a church's power to veto a liquor license (*Larkin v. Grendel's Den,*

5. While the Texas Supreme Court refers to *Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 608 P.2d 1102 (Kan. 1980), *appeal dismissed*, 449 U.S. 802 (1980), it correctly does not cite it as controlling. *Heart Ministries*, unlike the present case, involved a facial attack on a statute — *i.e.*, as invalid in all of its applications to any institutions whatever. No church, parents, children or staff were parties asserting constitutional interests separate from those of the institution involved. No issue under the Establishment Clause was raised nor issues of parental rights, rights of children, of churches or religious vocational rights.

Inc., 459 U.S. 297 (1983)), or such First Amendment questions as the rights of speech and association considered in *Federal Election Commission v. National Conservative Political Action Committee*, ____U.S. ____, 53 U.S.L.W. 4293 (U.S. March 19, 1985).

2. If this Court should summarily affirm the decision from which this appeal is taken, it will have created a precedent, of national effect, which, at the least, will call into doubt basic prior teachings of this Court on the Free Exercise and Establishment Clauses. As to the former, in this case a state supreme court has plainly disregarded this Court's teachings with respect to the state's burden of proof relating to compelling state interest and least restrictive means. Upon the trial, the State presented no evidence on these issues. The Texas Supreme Court thus espouses the position rejected by this Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), namely, that the fact that a legislature has enacted a statute for the protection of children is, without more, proof absolute that a compelling state interest justifies its application in all instances.

In *Yoder*, the Supreme Court stated categorically that it could not accept a "sweeping claim" of the importance of compulsory education, but rather was compelled to "searchingly examine" the State interest in the particular requirement at issue. 406 U.S. at 221. In this, the Court was greatly guided by the testimony of experts in the fields of education and religion. *Id.* at 209. This evidence demonstrated that the education provided Amish children was highly successful in terms of preparing them for life (*id.* at 224), and that State claims to the effect that children would not be adequately protected were "speculative" when compared to the evidence on the record. *Ibid.* The Court stated that the State had failed to produce "evidence" to support its position. *Id.* at 224-225. This evidence must consist, said the Court, of a "particularized showing" of harm to children, *id.* at 227, and any claims based upon the State's duty as

parens patriae, must be examined on the evidence "as revealed in this record". *Id.* at 229.

That the record in *Yoder* was insufficient to support the State claims is summarized in the following significant passage:

> "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in evidence."

Id. at 230. And, ultimately, the Court stated:

> "[I]t was incumbent on the state to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."

Id. at 236.

The Texas Supreme Court has written a new and arbitrary test for making determinations under the Free Exercise Clause. The salutary principle of judicial deference to the legislature is here badly distorted by the Texas Supreme Court. Further, the court below misconstrued the Supreme Court's conception of compelling state interest by concluding that the existence of such an interest is purely "a matter of law" (A-4) — this in the face of extremely detailed findings of fact based upon the trial record that belie any compelling interest of Texas in imposing its licensing-regulatory scheme upon the homes of Corpus Christi People's Baptist Church. (A-29). In deed Section 42.042(j) of the Code contradicts the claim of "compelling State interest" by authorizing waiver of any requirement if the "economic impact" of compliance would be "impractical". Thus the Code itself

subordinates its purported concern for the welfare of children to mere considerations of cost.

Furthermore, the Texas Supreme Court contradicts this Court's teaching on the Establishment Clause, stating:

> "The Establishment Clause cases address the issue of whether some form of government *aid*, either direct or indirect, to a religious institution violates the Establishment Clause."

(A-3). (Emphasis by the court). But in *Lemon* and the other "entanglement" cases, the principle was not that the entanglement was forbidden because it involved aid, but that the aid was forbidden because it involved entanglement. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).[6]

Incomprehensible, but, again, at odds with the teachings of this Court, is the rule of constitutional law set forth by the Texas Supreme Court when it holds that the "excessive entanglement" question is to be addressed under Free Exercise analysis since resort by the State to anything more than the "least restrictive means" results in excessive entanglements. (A-5). The entire treatment by the Texas Supreme Court of the Religion Clause questions which were before it reflects a total dis-

6. The Texas Supreme Court relies, in part, upon the decision of the United States Court of Appeals for the Fourth Circuit in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984), as support for its ruling that exempting the Church's homes would arguably have the primary effect of advancing religion, in violation of the Establishment Clause. Under this view the Establishment Clause forbids any accommodation of religious liberty not absolutely mandated by the Free Exercise Clause. But that view was clearly rejected by this Court in *Walz v. Tax Commission*, 397 U.S. 664 (1970), and in *Thomas v. Review Board*, 450 U.S. 707, 719-720 (1981), and by the federal district court in *Arkansas Day Care Association, Inc. v. Clinton*, 577 F.Supp. 388 (E.D. Arkansas 1983) (a case reaching a conclusion directly contrary to *Forest Hills*, though addressing similar facts and issues).

regard of the requirement that "when the First Amendment is involved, our standard of review is 'rigorous'." *Federal Election Commission, supra,* at 4299.

Moreover, the Texas Supreme Court opinion distorts the meaning of *Prince v. Massachusetts,* 321 U.S. 158 (1944). *Prince* stands for protection of the child. That, too, is the essence of the Church's case. But the Texas Supreme Court would expand *Prince* to mandate, with no exceptions, total government control of all child care — in the absence of any proof that the State's methodology is effective or even that it is superior to other methodologies. Indeed, that court says that the State has "the right and duty to protect and nurture *its* minor children" — as though the children placed by their parents in the Church's homes belong to the State and not to their parents. (A-6). It is precisely this kind of "sweeping claim" of *parens patriae* that this Court has discountenanced. *Yoder, supra,* at 221, 234.

3. Three courts below have passed upon the conflicting claims in this case. Two ruled in favor of appellants. Extensive discovery, particularly as related to the issues of excessive entanglement and compelling state interest, had preceded the trial. The trial court, having viewed the premises and observed the witnesses, studied the record and made detailed findings of fact supportive of the position of the appellants and adverse to the claims of the State. The Texas Court of Appeals, agreeing, confirmed those findings of fact.[7] The Texas Supreme Court, faced by appellants' good faith assertions of federal right, ruled adversely on those federal claims by ruling contrary to the established facts.[8] That court, for ex-

---

7. Citations to the Appendix, pages A-12 through A-29, are to the Findings of Fact by the Texas Court of Appeals. Article 5, §6 of the Texas Constitution provides that the decisions of Texas Courts of Appeals "shall be conclusive on all questions of fact brought before them on appeal or error."

8. Such arbitrary treatment offends the procedural due process requirement of "fundamental fairness" in the resolution of disputed

ample, attacked the Church's religious objections relating to licensing and methodology, stating that "[t]he homes can comply with the law's modest requirements that are mandatory for all other homes." (A-7–A-8). That is flatly contradicted by the record which shows that the Church — because its fundamental religious convictions clash directly with numerous statutory and regulatory provisions — can*not* comply with the law's (pervasive) requirements. (A-24 – A-28).[9] Adherence to religious principle is at once the *sine qua non* of the Church's success in its work for children and the immovable obstacle to its accepting licensing.

The Texas Supreme Court ignored the findings of the trial court and Court of Appeals with respect to compelling state interest. (See A-28–A-29). As the Court of Appeals had noted, the State had utterly failed to prove the existence of such an interest. Instead, it had been demonstrated that the State sought to affix upon the Church's homes "a regulatory mass which the Chief Administrator [*i.e.*, the Commissioner of Human Resources] could not justify, or, in important instances, even explain." (A-32).

Misconceiving the teachings of this Court on "excessive entanglements", the Texas Supreme Court again

---

matters involving fundamental liberties. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

9. In place of the record evidence, the Texas Supreme Court substitutes an *argument* — namely, that the Church's objection to the licensing-regulatory scheme cannot be bona fide since the Church accepts incorporation. Incorporation is purely discretionary with the Church under Texas law. The Church existed legally before incorporating and would continue to exist after dissolution of corporate status. Incorporation, unlike a license under the Code, is not a *permit to exist* and involves no State management or close supervision of the corporation's activity. Fire, building occupancy, health, safety and sanitation permits (which the Church believes to be justified by a compelling state interest) do not directly relate to program, or remotely carry with them the regulatory freight involved in the Code's licensing system.

ignored the record findings. As to this, it is respectfully suggested the Court closely review the facts as disclosed in the findings (A-19 – A-24) which show that the regulatory scheme necessitates a program of sustained and detailed surveillance and intrusion by the State with respect to the Church's homes. This has included the use of undercover investigators posing as Church members attending worship services at the homes, reporting contents of sermons, contacting children residing in the homes to solicit code-worded communications from them, and the use of binoculars, cameras and tape recorders to solicit information about persons connected with the Church. (A-23 – A-24). Further, the Texas Supreme Court ignored the fact that state licensing representatives instigated rebellious and destructive behavior on the part of children in the homes by criticizing the Church's programs of care. (A-65).

4. The outcome of this appeal will directly affect, for good or ill, the future lives of those 250 children now resident at the Church's homes, as well as the lives of their families. For many of these children residence in State homes had accomplished nothing (A-12), and for most, the Church's homes are a last avenue of hope. (A-28).

This appeal thus asks whether, in this era of national distress over drug abuse, violence, suicide, crime and other behavioral disorders among American youth, a "high quality service" for such youngsters, with "excellent physical facilities, a dedicated staff" and a record of success in treatment of them (at great savings to taxpayers) shall be shut down on the basis of speculative assumptions by the Texas Supreme Court respecting abuses that might be practiced by other religious institutions.[10] (*Cf.*, decision of the trial court, A-49).

---

10. This Court has already, in clear terms, turned aside a similarly restrictive view limiting fundamental freedoms closely allied with those here at stake:

One result, if the Texas Supreme Court decision is allowed to stand uncorrected, will be to inform welfare departments in all fifty states that they have an absolutely free hand to totally control church child care agencies, even though those ministries do not participate in governmental funding, and irrespective of the fact that they represent a real-life "least restrictive means" for the regeneration of distressed children.

At core this appeal tests the question of whether methods of rehabilitation of "terminal" children, other than secular methods prescribed by the state, may be employed in our society and whether child care institutions not controlled by the state (except as to fire, health, building occupancy, safety and sanitation measures) shall have liberty to exist.

> "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."

Parham v. J.R., 442 U.S. 584 603 (1979). (Emphasis in original). As with parental rights, so too with religious rights: abuses thereof should be corrected by remedial measures pinpointed to the practice at issue. Overly broad attempts should not be made to prevent abuses by decreeing programs of prior restraint and total control, thus extinguishing the liberties of non-transgressors.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

BALL & SKELLY
William Bentley Ball
Philip J. Murren
Sandra E. Wise
511 N. Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

COOVER & COOVER
Ann E. Coover
921 North Chaparral
Corpus Christi, TX 78401
(512) 882-2100

Attorneys for Appellants

May 14, 1985